growing importance, should be controlled by legislative action and that not until that time will this industrial warfare be governed by a definite and fixed set of rules and standards.

G. F. D.

FEDERAL EMPLOYERS' LIABILITY ACT—SCOPE AND APPLICATION—WHEN IS AN EMPLOYEE ENGAGED IN INTERSTATE COMMERCE?—The first section of the Federal Employers' Liability Act of 1908[1] provides that every common carrier by railroad, "while engaging" in interstate commerce, shall be liable for the injury or death of an employee, due to negligence, "while he is employed by such carrier in such commerce." To recover under this act, therefore, the employee must have been at the time of the injury engaged in interstate commerce. But when is a man employed in interstate commerce within the act? This question has frequently arisen since the passage of the act, and has in many instances produced considerable difference of opinion among the courts.

The clearest case is one in which the injured employee was at the time actually engaged in the operation of an interstate train. This would apply to engineers,[2] firemen,[3] brakemen,[4] and others working on such a train. Going a step further, it has been held that a workman who couples cars, some of which are engaged in interstate commerce and some not, is likewise engaged in such commerce.[5] Members of switching crews at railroad terminals while engaged in moving cars containing interstate shipments are also held to be employed in interstate commerce, within the meaning of the act.[6] But if at the moment of the accident the employee is switching cars which contain only interstate shipments, he is not within the act, although a few minutes before he was moving interstate cars.[7] Moreover if a yard clerk who has the duty of making a record of trains brought into and sent out of the terminal yard, is killed while performing these duties with respect to an interstate train, he is considered to fall within the act.[8] This may seem to extend the doctrine beyond its proper limits, but it is the rule of the United States Supreme Court.

The case of persons repairing instrumentalities connected with interstate commerce has caused the courts some difficulty. It seems

[1] Act Apr. 22, 1908, c. 149, § 1, 35 U. S. Stat. at L. 65.
[2] Borton v. Seaboard Air Line Rwy. Co., 157 N. C. 146 (1911).
[3] Rowlands v. Chicago & N. W. Rwy. Co., 149 Wis. 51 (1912).
[4] Vaughan v. St. Louis & S. F. Rwy. Co., 177 Mo. App. 155 (1914).
[5] Johnson v. Great Northern Rwy. Co., 178 Fed. 643 (1910).
[6] Montgomery v. Southern P. Rwy. Co., 64 Ore. 597 (1913).
[7] Illinois Cent. Rwy. Co. v. Behrens, 233 U. S. 473 (1914).
[8] St. Louis, S. F. & T. Rwy. Co. v. Seale, 229 U. S. 156 (1913).

that one who manufactures an engine, or lays a track for future use in interstate commerce, should be held to be preparing for such commerce, rather than to be engaged in it. Therefore it is declared that one who merely constructs a tunnel through which interstate trains are expected to pass is nevertheless not engaged in interstate commerce.[9] But persons repairing engines or cars, or tracks or switches, used indiscriminately in interstate and intrastate commerce, are regarded as within the act.[10] In a leading case[11] an ironworker was struck by a train and killed while carrying from a tool car to a bridge, over which both interstate and intrastate trains were accustomed to run, a sack of rivets which were to be used the next morning in repairing the bridge, the repair to consist of taking out an old girder and putting in a new one. It was held by a divided court that the decedent was at the time of his death employed in interstate commerce.[12]

The cases already cited constitute only a few of the large number in which the problem has arisen; but they show that the tendency of the courts is very strongly in favor of declaring a railroad employee to have been engaged in interstate commerce within the purview of the Federal Employers' Liability Act, whenever it is reasonably possible so to hold. It is difficult, however, to deduce from the cases a definite test which will serve as a touchstone in determining whether or not a particular individual is employed in interstate commerce.

The case of *Lamphere* v. *Oregon, etc., Co.*[13] advances the following as a test: "Was the relation of the employment of the deceased to interstate commerce such that the personal injury to him tended to delay or hinder the movement of a train engaged in interstate commerce?" This seems faulty, as it is conceivable that an injury to a person employed solely in intrastate commerce might nevertheless hinder interstate transportation. The Pedersen case, a leading case on this question,[14] declared that the true test always is: "Is the work in question a part of the interstate commerce in which the carrier is engaged?" But the court said, "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and

[9] Jackson v. Chicago, St. P. & M. Rwy. Co., 210 Fed. 495 (1914).

[10] Northern P. Rwy. Co. v. Maerkl, 198 Fed. 1 (1912); Southern Rwy. Co. v. Howerton, 105 N. E. 1025 (Ind. 1914).

[11] Pedersen v. Delaware, L. & W. Rwy. Co., 229 U. S. 146 (1913).

[12] The dissenting judges thought that the work in which the deceased was engaged at the time was not a part of commerce, but an incident which preceded it; and that the "commerce" meant by the act was confined to transportation.

[13] 196 Fed. 336 (1912).

[14] *Supra*, note 11.

during their use as such." A distinction is therefore suggested between original construction of instrumentalities for future use in interstate commerce, and the maintenance and repair of instrumentalities after they have entered into use in such commerce.

Another test has been suggested by an annotator:[15] "Did the condition, both in respect of the source of the danger and of the hazardous situation of the employee, arise out of the operation of interstate commerce?"[16] A text-writer says, "All who are at the time of the injury engaged in duty which has direct relation to the interstate business of the carrier are entitled to the protection of the act."[17] The same writer goes on to say,[18] "These general terms include the vast majority of the employees of an interstate railroad who may be affected by peril of accident, for, as railroads are practically conducted, there are few employees whose duty is so purely local that they have no relation to interstate traffic."

These tests are obviously all general in their terms, and are after all of comparatively slight value when a particular set of facts is presented for judicial decision. It is perhaps best not to seek a technical rule which will automatically answer the problem, but rather to examine the facts with a view to determining whether they fall within the true spirit and intent of the Employers' Liability Act, which, it is submitted, should in this respect be liberally construed. And there is no doubt that it has been so construed in the vast majority of cases.

With all the precedents before it, it is easy to account for the decision handed down in a recent case by the Supreme Court of Iowa.[19] An electric railway company was engaged in both interstate and intrastate commerce. Alongside its track was a row of poles bearing cross-arms, on which were strung various wires, including a single wire which was part of the block signal system. The company decided to substitute a more efficient system and for this purpose a lineman was sent up on the poles to nail up additional cross-arms, which were to bear the old signal wire and five or six new signal wires, all being intended for use in the new system. While so engaged, the lineman was killed by an electric shock. It was held by five judges that at the time of his death the decedent was employed in interstate commerce within the meaning of the federal act. Two judges were of the opposite opinion.

It was argued by counsel for the railroad, harking back to the distinction in the Pedersen case,[20] that the work in which the de-

[15] In 6 Neg. & Comp. Cases Annotated, p. 198.

[16] He says further, "It must be borne in mind in this regard that mixed intrastate and interstate commerce constitutes interstate commerce."

[17] Doherty: Liability of Railroads to Interstate Employees, p. 88 (ed. 1911).

[18] *Idem*, p. 89.

[19] Ross v. Sheldon, 154 N. W. 499 (Ia. 1915).

[20] *Supra*, note 11.

cedent was engaged was not that of repair or maintenance, but was new construction work. The court declared, however, that the work was for the purpose of improving the road and maintaining "sufficiency in its equipment," and that in such case the distinction between "repair" and "construction" should not be drawn too fine.[21] The dissenting judges, however, clung to the view that the deceased was not engaged in the repair of an instrumentality which had theretofore been used in both intra and interstate commerce.

In both opinions, the Pedersen case [22] was cited as a sustaining authority. It seems, however, that the decision of this case goes far toward doing away with the distinction suggested in the earlier case between construction and repair. The effect of the conclusion reached is practically that an improvement in interstate railroad service, even though it really be a new construction, is a part of interstate commerce.[23]

In this connection one thing, in particular, should be noted. The original Employers' Liability Act of 1906,[24] which provided that an interstate carrier should be liable for injury or death of "any of its employees," was held unconstitutional because it included all employees," whether engaged in interstate commerce or not.[25] The act of 1908 [26]—the present act—was intended to remedy this defect in the first act, by restricting liability to the case of an employee injured or killed "while he is employed" in interstate commerce. The principal case illustrates the present tendency to construe the second act to include almost all employees of interstate carriers, and thus to render the act of 1908 nearly as broad as the act of 1906.

E. E.

[21] Mr. Justice Evans, in rendering the opinion of the court, mentions the fact that the old wire was to be used in conjunction with the new, and that the additional wires therefore did not constitute an independent construction. Mr. Chief Justice Deemer, dissenting, thought that that fact was immaterial. "Surely," he says, "if the plaintiff had been engaged in the construction of another track to make a double-track road, which new track had never been used in commerce of any kind, the use of old rails which had once been used in interstate commerce, even as a part of a railway engaged in interstate commerce would not affect the matter in any way."

[22] *Supra,* note 11.

[23] There is a similar case, Grow v. Oregon Short Line R. Co., 138 Pac. 398 (Utah 1913), which the court failed to cite. There it was held that one employed in installing a block signal system was engaged in interstate commerce.

[24] Act June 11, 1906, c. 3073, § 1, 34 U. S. Stat. at L. 232.

[25] The Employers' Liability Cases, 207 U. S. 463 (1908).

[26] *Supra,* note 1.